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FILED
NOV 13 2006
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SUPREME COURT, U.S.

No. 06-102

# In the Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,
PETITIONER

*v.*

MALAYSIA INTERNATIONAL SHIPPING CORPORATION

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*.

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## INTEREST OF THE UNITED STATES

This case presents the question whether a federal district court must conclusively determine that it has jurisdiction over a case before it may dismiss the case under the *forum non conveniens* doctrine. The resolution of that question will have policy implications for the United States with respect to both domestic and foreign litigation.

The doctrine of *forum non conveniens* arises in the federal courts exclusively in the context of a request that the court defer to adjudication of the parties' dispute in the courts of a foreign nation. In many cases over the past several years, defendants in suits brought under the Foreign Sovereign Immunities Act of 1976

(FSIA), 28 U.S.C. 1602 *et seq.*, or Alien Tort Statute (ATS), 28 U.S.C. 1350, have sought dismissal on non-merits threshold grounds such as *forum non conveniens*, international comity, and the political question doctrine, in deference to resolution of the plaintiff's claim in the country where the wrong took place. On several occasions, the United States has appeared as amicus and argued that the courts may dismiss on such grounds without deciding difficult questions of jurisdiction, which often can turn on questions which could be very sensitive to the foreign government whose conduct is at issue. The United States has a significant interest in maintaining the federal courts' ability to avoid unnecessary adjudication in cases that, for example, may involve delay, burdensome or sensitive discovery, or examination of difficult legal issues.

The United States also invokes the doctrine of *forum non conveniens* on its own behalf as a party to litigation abroad. The doctrine is not unique to the United States (indeed, it did not originate here), but rather is incorporated into the law of a variety of countries. See *American Dredging Co.* v. *Miller*, 510 U.S. 443, 449-450 (1994). A holding by this Court that a court must conclusively establish jurisdiction before dismissing a case on *forum non conveniens* grounds could have an adverse impact on the United States when it raises that or similar non-merits grounds for dismissal in foreign litigation.

## STATEMENT

1. A federal court has discretion to dismiss a case under the common law doctrine of *forum non conveniens* when "an alternative forum has jurisdiction to hear [a] case," and "when trial in the chosen forum would establish . . . oppressiveness and vexation to a

defendant . . . out of all proportion to plaintiff's convenience," or when "the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447-448 (1994) (quoting *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 (1981)). Dismissal on *forum non conveniens* grounds can reflect a "broad[] range of considerations, * * * most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (citing *Piper Aircraft*, 454 U.S. at 241, 257-261; *id.* at 261-262 (Stevens, J., dissenting), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509, 511 (1947)). In light of the federal venue transfer statute, which authorizes district courts to transfer cases "in the interest of justice * * * to any other district or division where it might have been brought," 28 U.S.C. 1404(a), "the federal doctrine of *forum non conveniens* has continuing application only in cases in which the alternative forum is abroad." *American Dredging*, 510 U.S. at 449 n.2. Cases involving foreign parties, foreign law, and acts in foreign countries are therefore the typical candidates for *forum non conveniens* dismissals.

2. Petitioner Sinochem International Co. Ltd., a Chinese company, purchased a large number of steel coils from an American firm that is not a party to this action. Pet. App. 3a. Under the terms of the purchase contract, the seller was to receive payment only if a valid bill of lading was issued certifying that the coils had been loaded for shipment on or before April 30, 2003. *Id.* at 3a-4a. The coils were shipped from Philadelphia to China aboard a vessel owned by respondent Malaysia International Shipping Corp., a Malaysian company. *Id.*

at 4a, 49a. A bill of lading, dated April 30, 2003, was issued in Philadelphia acknowledging the loading of the coils. *Ibid.*

In June 2003, petitioner filed a petition in the Chinese admiralty court for presentation of a maritime claim against respondent and for arrest of the vessel when it arrived in China. Pet. App. 5a. Petitioner alleged that respondent fraudulently backdated the bill of lading, and in fact had not loaded the shipment until May. *Id.* at 5a, 38a. The Chinese admiralty court granted the petition and, on the court's order, the vessel was subsequently arrested at the Huangpu Port. *Id.* at 5a. Respondent posted a $9 million bond to secure its release. *Ibid.*

Petitioner subsequently filed a complaint against respondent in the Chinese admiralty court asserting that the bill of lading had been falsified and that it had been injured as a result. Pet. App. 6a. Respondent moved to dismiss on jurisdictional grounds, but the admiralty court denied the motion and its holding was affirmed on appeal by the Guangdong Higher People's Court. *Ibid.* That suit apparently remains pending in China.

3. Shortly after the ship was arrested, respondent filed its own suit against petitioner in the United States District Court for the Eastern District of Pennsylvania. Pet. App. 5a. Respondent claims that the allegations in petitioner's petition to the Chinese admiralty court for arrest of the vessel constituted negligent misrepresentations regarding the shipping vessel's fitness and suitability and that respondent was injured by the delay due to the arrest of the vessel. See *id.* at 5a-6a.

Petitioner moved to dismiss the suit in district court on several grounds, including lack of subject matter ju-

risdiction, lack of personal jurisdiction, *forum non conveniens*, and principles of international comity. Pet. App. 7a. The district court first determined that it possessed subject matter jurisdiction under 28 U.S.C. 1333, which confers jurisdiction on the district courts over admiralty and maritime matters. Pet. App. 51a-54a. The court next concluded that it did not have personal jurisdiction over petitioner under Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. Ann. §§ 5301 *et seq.* (West 2004), but suggested that limited discovery might reveal that personal jurisdiction could be established under Fed. R. Civ. P. 4(k)(2). Pet. App. 55a-59a; *id.* at 59a-63a.

The district court did not allow discovery or decide whether it had personal jurisdiction over petitioner, however, because it concluded that dismissal was warranted under the doctrine of *forum non conveniens*. Pet. App. 63a-69a; *id.* at 40a-47a (denial of Rule 59(e) motion). The court concluded that the parties' dispute could be resolved adequately and more easily in the Chinese courts. *Id.* at 64a-65a; *id.* at 42a-44a. It further concluded that the interests of the United States were not implicated in the dispute. *Id.* at 65a-67a; *id.* at 44a-47a. Although the choice-of-law clause in the bill of lading itself called for the application of United States law, the district court found the purchase contract's choice of Chinese law to be more apposite. *Id.* at 66a-67a; *id.* at 46a. And while the cargo had been loaded in the United States, the actual subject matter of the dispute—involving the arrest of a foreign ship in foreign waters pursuant to an order of a foreign court—was purely foreign. *Id.* at 67a.

4. A divided panel of the court of appeals vacated and remanded the case for a conclusive determination whether the district court had personal jurisdiction over

petitioner. Pet. App. 3a-36a. According to the majority (which agreed that there was subject matter jurisdiction), the district court could not dismiss the case on *forum non conveniens* grounds unless and until it fully established that it had both subject matter and personal jurisdiction. *Id.* at 3a-32a.

The majority relied on two main rationales. First, it reasoned that "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue." Pet. App. 21a. According to the majority, a court cannot abstain from exercising jurisdiction under the *forum non conveniens* doctrine unless it establishes that it actually has such jurisdiction in the first place. *Id.* at 21a-22a (citing *Gulf Oil, supra*).

Second, the majority relied on this Court's holding in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), which instructs that a court may not decide the merits of a case before establishing that it has subject matter jurisdiction. Pet. App. 17a, 26a. According to the majority, a court dismissing for *forum non conveniens* before finding personal jurisdiction would be exercising "hypothetical jurisdiction" in violation of *Steel Co.* See *id.* at 26a. The panel majority acknowledged that this Court had clarified *Steel Co.* in *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574 (1999), by holding that a court could dismiss a case on "non-merits grounds such as personal jurisdiction" before finding subject matter jurisdiction, *id.* at 584 (internal quotation marks, alterations and citation omitted), and the court of appeals further determined that *forum non conveniens* constitutes a non-merits ground for dismissal. Pet. App. 17a, 19a-21a. Nonetheless, the majority concluded that

subject matter and personal jurisdiction must always be resolved before non-jurisdictional questions such as *forum non conveniens*. *Id.* at 22a-32a.

The majority acknowledged that its view was in conflict with those of the Second and District of Columbia Circuits. See Pet. App. 24a-26a (citing *In re Arbitration Between Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-498 (2d Cir. 2002); *In re Minister Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998)). The court found the contrary position of the Seventh and Ninth Circuits to be more persuasive. See Pet. App. 23a-24a, 29a (citing *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 800 n.3 (9th Cir. 2001), aff'd in part, cert. dismissed in part, 538 U.S. 468 (2003); *Kamel* v. *Hill-Rom Co.*, 108 F.3d 799, 805 (7th Cir. 1997)).[1]

Judge Stapleton dissented. Pet. App. 32a-36a. In his view, *Ruhrgas* permits a court to dismiss a case on a non-merits ground such as *forum non conveniens* before deciding whether it has jurisdiction. *Id.* at 33a-36a. He saw no reason why a court could not dismiss a case after concluding that even if jurisdiction existed the court would decline to exercise it. *Ibid.*

## SUMMARY OF ARGUMENT

The court of appeals mistakenly held that this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), "dictate" the conclusion

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[1] The Seventh Circuit has called into question the Third Circuit's characterization of *Kamel*. In *Intec USA, LLC* v. *Engle*, No. 06-1117, 2006 WL 3093644 (Nov. 2, 2006), the Seventh Circuit stated: "Unlike the majority in *Sinochem*, we do not read *Kamel* as committing this court to a rule that subject-matter jurisdiction always must be resolved ahead of *forum non conveniens*." *Id.* at *2.

that district courts "must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits." Pet. App. 26a. In *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574 (1999), this Court rejected that kind of inflexible approach, explaining that "a federal court [may] choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585. Permissible threshold grounds include both mandatory jurisdictional grounds for dismissal, such as personal jurisdiction, *id.* at 584-585, and discretionary, non-jurisdictional bases for dismissal, such as abstaining from the adjudication of pendent state law claims, *id.* at 585.

The doctrine of *forum non conveniens* is a similar non-merits, threshold issue. A dismissal on *forum non conveniens* grounds does not decide the merits of the underlying case, but rather, like a dismissal based on improper venue, holds only that there is a more appropriate forum for litigating the parties' dispute. Thus, just as a case may be transferred for improper venue by a court that lacks (or has not decided whether it has) personal jurisdiction over the defendant, see *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 465-466 (1962), it may similarly be dismissed on *forum non conveniens* grounds. By dismissing a claim in favor of adjudication in another forum before establishing its own jurisdiction, a court does not exercise hypothetical "law-declaring power" in the way that *Steel Co.* held would be impermissible.

Allowing a court to choose among threshold, non-merits bases for dismissal enables it to avoid opining unnecessarily on legal issues that may be more difficult or time-consuming, including novel issues and those with constitutional dimensions. Moreover, a rule that required courts to resolve jurisdictional issues before dis-

missing on *forum non conveniens* grounds could largely negate the benefits of the doctrine, by subjecting defendants to the very litigation burdens—such as jurisdictional discovery, especially in an inconvenient forum—that the doctrine is intended to avoid. Abroad, the United States as a defendant would seek to avoid such burdens. In our own courts, suits that involve activities abroad by foreign corporations, that are against foreign sovereigns, or that challenge the conduct of foreign governments can be quite sensitive. When appropriate, dismissal on *forum non conveniens* grounds prior to resolving the jurisdictional inquiry could allow the court to avoid creating unnecessary foreign relations difficulties.

## ARGUMENT

### A FEDERAL COURT MAY DISMISS A CASE ON *FORUM NON CONVENIENS* GROUNDS WITHOUT FIRST DETERMINING THAT IT HAS JURISDICTION

In *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court reiterated the long-standing "requirement that jurisdiction be established as a threshold matter." *Id.* at 94. "For a court to pronounce upon the merits when it has no jurisdiction to do so," the Court explained, "is, by very definition, for a court to act ultra vires." *Id.* at 101-102. Only a year later, however, the Court unanimously clarified that a federal court may "choose among threshold grounds for denying audience to a case on the merits." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). The doctrine of *forum non conveniens* is one such non-merits threshold ground upon which a court may dismiss a suit before resolving disputed questions regarding the court's jurisdiction "to pronounce upon the merits." *Steel Co.*, 523 U.S. at 101.

### A. A Court Does Not Exceed Its Authority By Dismissing A Suit On A Threshold, Non-Merits Basis Before Establishing Its Jurisdiction

The key holding of *Steel Co.* was its rejection of the practice of "'assuming' jurisdiction for purpose of deciding *the merits*" because doing so "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." 523 U.S. at 94 (emphasis added). See *Ruhrgas*, 526 U.S. at 583 ("*Steel Co.* held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers *the merits* of a case.") (emphasis added); *id.* at 577 ("Jurisdiction to resolve cases on the merits requires both" subject matter jurisdiction and personal jurisdiction over the parties "so that the court's decision will bind them."). In contrast, there is no similar problem of *ultra vires* action when a court *declines* to adjudicate the merits of a case without first completing its jurisdictional inquiry. When a court dismisses on non-merits grounds before ascertaining its jurisdiction, it "makes no assumption of law-declaring power that violates the separation of powers." *Id.* at 584-585 (citation omitted). Such acts of judicial abnegation of the power to decide are quite different from the judicial arrogation of the power to resolve a case on the merits.

The Court recognized in *Steel Co.* and reiterated in *Ruhrgas* that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, * * * or abstain under *Younger* v. *Harris*, 401 U.S. 37 (1971), without deciding whether the parties present a case or

controversy." *Ruhrgas*, 526 U.S. at 585 (citing *Steel Co.*, 523 U.S. at 100-101 n.3, *Moor* v. *County of Alameda*, 411 U.S. 693, 715-716 (1973), and *Ellis* v. *Dyson*, 421 U.S. 426, 433-434 (1975)). Indeed, two Justices in the *Steel Co.* majority emphasized that "the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in 'reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.'" 523 U.S. at 110-111 (O'Connor, J., joined by Kennedy, J., concurring) (quoting *Norton* v. *Mathews*, 427 U.S. 524, 532 (1976)).

More recently, in *Tenet* v. *Doe*, 544 U.S. 1 (2005), the Court ruled that it could address the question whether respondents' claims were barred under *Totten* v. *United States*, 92 U.S. 105 (1876), which held that suits against the United States based on secret espionage agreements should not proceed, without first determining whether the district court lacked jurisdiction over the suit because the Tucker Act, 28 U.S.C. 1491, granted the Court of Federal Claims exclusive jurisdiction over respondents' claims. 544 U.S. at 6-7 n.4. The Court assumed, without deciding, that "this Tucker Act question is the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim." *Id.* at 6 n.4. Nonetheless, the Court determined that "application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger* v. *Harris* * * * or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." *Id.* at 6-7 n.4.[2] See also *Vermont*

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[2] In support of its reference to the "prudential standing doctrine" as presenting a threshold issue for those purposes, the Court cited

*Agency of Natural Res.* v. *Stevens*, 529 U.S. 765, 779 (2000) (holding that the Court could, consistent with *Steel Co.*, decide whether a State qualifies as a "person" subject to suit under the False Claims Act, 31 U.S.C. 3729 *et seq.*, before resolving whether the State was immune from suit under the Eleventh Amendment).

As we explain below, the doctrine of *forum non conveniens* presents a similar non-merits ground for dismissal that can be decided at the threshold before the court resolves difficult questions of jurisdiction.

### B. *Forum Non Conveniens* Is A Threshold, Non-Merits Ground For Dismissal

1. In *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994), the Court characterized the doctrine of *forum non conveniens* as "nothing more or less than a supervening venue provision." *Id.* at 453. Thus, dismissal of a case under the doctrine of *forum non conveniens* "goes to process rather than substantive rights." *Ibid.* Notably, the court of appeals in this case also recognized that a dismissal for *forum non conveniens* is "not merits based." Pet. App. 19a-21a. That aspect of its decision is clearly correct.

A dismissal on *forum non conveniens* grounds reflects a determination that the merits should be litigated

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*Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004), in which the Court assumed Article III standing in order to "address the alternative threshold question" whether attorneys had third-party standing as a prudential matter to raise the rights of hypothetical indigents to challenge a procedure for appointing appellate counsel. See *Tenet*, 544 U.S. at 7 n.4; see also *Steel Co.*, 523 U.S. at 97 n.2 (stating that a statutory standing question can be given priority over an Article III question, citing cases discussed in Justice Stevens' dissenting opinion, *id.* at 115-117); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (following *Steel Co.* on that point).

in *another*, more convenient forum. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 256 (1981) (recognizing that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient"). Necessarily, therefore, a district court's dismissal on *forum non conveniens* grounds does "not resolve the merits" of the claim dismissed. *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 148 (1988). See also Fed. R. Civ. P. 41(b) (expressly providing that a dismissal for improper venue is not considered an "adjudication upon the merits"); *American Dredging*, 510 U.S. at 453-454 (holding that the doctrine of *forum non conveniens* "is one of procedure rather than substance" that "does not bear upon the substantive right to recover" under federal maritime law).

Because a *forum non conveniens* dismissal is not merits-based, a dismissal on that ground has no claim-preclusive effect. In *Chick Kam Choo*, for example, this Court held that the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. 2283, did not authorize a federal court to enjoin litigation in state court of a claim the federal court had dismissed on *forum non conveniens* grounds after concluding that it should be litigated in Singapore. 486 U.S. at 148. The Court explained that the federal court's *forum non conveniens* dismissal did "not resolve the merits" of the claim. *Ibid.*

In fact, as *Chick Kam Choo* makes clear, because the *forum non conveniens* doctrine furnishes a procedural rule of the forum, a dismissal on that basis does not even have issue-preclusive effect vis-a-vis another forum. Thus, in *Chick Kam Choo*, "the only issue decided" by the federal court's *forum non conveniens* dismissal was that the plaintiff's "claims should be dismissed under the federal *forum non conveniens* doctrine," and not

"whether Texas courts, which operate under a broad 'open courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit." 486 U.S. at 148. Likewise, "a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a)." *Parsons* v. *Chesapeake & Ohio Ry.*, 375 U.S. 71, 73-74 (1963).[3]

2. The court of appeals also correctly concluded (Pet. App. 18a-20a) that the mere fact that a court's application of the *forum non conveniens* doctrine may require it to refer to the merits of the claim does not mean that the doctrine is merits-based for purposes of *Steel Co.*

As the court of appeals noted (Pet. App. 18a-19a), at least one circuit has concluded that *Steel Co.* requires addressing personal jurisdiction before *forum non conveniens* based on its reading of this Court's decision in *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988). See *Dominguez-Cota* v. *Cooper Tire & Rubber Co.*, 396 F.3d 650, 653 (5th Cir. 2005). In particular, the Fifth Circuit relied on a passage in *Biard* stating that a *forum non*

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[3] A dismissal on *forum non conveniens* grounds might have issue-preclusive effect within the same jurisdiction. See *Vasquez* v. *Bridgestone/Firestone, Inc.*, 325 F.3d 665, 678 (5th Cir. 2003). But even that is not clear and in any event that would not undermine the conclusion that *forum non conveniens* is a threshold, non-merits determination. A dismissal for lack of personal jurisdiction would also have issue-preclusive effect, see *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 524-527 (1931), yet this Court has made clear that that fact does not prevent a court from dismissing for lack of personal jurisdiction before deciding whether it has subject-matter jurisdiction. See *Ruhrgas*, 526 U.S. at 585-586. Indeed, even a ruling on subject matter jurisdiction can have issue-preclusive effect. See *Ins. Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982).

*conveniens* ruling is not "completely separate from the merits of the action." *Id.* at 653 (quoting *Biard*, 486 U.S. at 527). However, *Biard* held only that a district court's denial of a motion to dismiss on *forum non conveniens* grounds is not immediately appealable under the collateral order doctrine. 486 U.S. at 527. The Court reasoned that some, though not all, of the factors that a court will consider in ruling on a *forum non conveniens* motion—such as what evidence will be relevant to the plaintiff's claim or any defenses—"will substantially overlap factual and legal issues of the underlying dispute." *Id.* at 529.

The fact that a court undertaking a *forum non conveniens* determination may, depending on the circumstances of the particular case, have to identify the issues presented by a case and the evidence that would be relevant to adjudicating those issues does not mean that a *forum non conveniens* dismissal is merits-based for purposes of *Steel Co.* See *Lacey* v. *Cessna Aircraft Co.*, 932 F.2d 170, 181 (3d Cir. 1991) (*forum non conveniens* motion requires no more than that the court "delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof"). Other threshold inquiries that the Court has identified as "non-merits" can also require a court at least to take a peek at the merits.[4]

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[4] Nor is there any necessary relationship between issues that are threshold issues for *Steel Co.* purposes and issues that are appealable under the collateral order doctrine. A refusal to dismiss on grounds of subject matter or personal jurisdiction would not be immediately appealable, whereas other issues, such as a qualified immunity defense, are immediately appealable but clearly involve adjudication on the merits.

Ruling on a motion to dismiss for lack of personal jurisdiction, for example, can require a court to determine whether a defendant's contacts with the forum relate to the claim advanced by the plaintiff. See, *e.g.*, *Ruhrgas*, 526 U.S. at 581 n.4 (noting that the district court's holding that it lacked personal jurisdiction was based on its conclusion "that Marathon had not shown that Ruhrgas pursued the alleged pattern of fraud and misrepresentation during the Houston meetings"). Likewise, in deciding whether to exercise jurisdiction over pendent state law claims, a court must assess factors similar to those considered in conducting a *forum non conveniens* analysis—*i.e.*, "judicial economy, convenience and fairness to litigants"—that require it to make determinations regarding the complexity and predominance of the state claims at issue. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Nonetheless, this Court has made clear that the court may decline to exercise pendent jurisdiction over state claims before resolving whether it would actually have jurisdiction over those claims at all. See *Ruhrgas*, 526 U.S. at 585.

Because a *forum non conveniens* motion presents a threshold, non-merits issue that does not require the court to assume "law-declaring power," *Ruhrgas*, 526 U.S. at 584 (citation omitted), a court may dismiss on that basis before resolving questions regarding its jurisdiction.[5]

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[5] For the reasons already stated, a dismissal is permissible in appropriate cases on *forum non conveniens* grounds before the court ascertains either subject matter or personal jurisdiction. That conclusion is even more strongly compelled with respect to personal jurisdiction because, while subject matter jurisdiction is nonwaivable and "must be policed by the courts on their own initiative even at the highest level," personal jurisdiction may be waived by a party.

### C. The Doctrine of *Forum Non Conveniens* Does Not Independently Require That A Court First Ascertain Its Own Jurisdiction Before Dismissing A Suit In Favor Of An Alternative Forum

1. a. Although the court of appeals correctly determined that *forum non conveniens* is a "non-merits procedural issue," Pet. App. 21a, it nonetheless held that a court must find that it possesses jurisdiction before it can dismiss on *forum non conveniens* grounds, because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue," *ibid.* (citing *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 504 (1947)). That is so, the court reasoned, because "if [a court] has no jurisdiction *ipso facto* it cannot abstain from the exercise of it." *Id.* at 25a. There is, however, no rule, constitutional or otherwise, that prevents a court from dismissing a case on the ground that *if* it had jurisdiction, it would decline to exercise that jurisdiction.

As previously noted, this Court has expressly upheld the courts' authority to "decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction," *Ruhrgas*, 526 U.S. at 585, or to invoke "the abstention doctrine of *Younger* v. *Harris*" before addressing jurisdiction. *Tenet*, 544 U.S. at 6-7 n.4. There is no valid

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*Ruhrgas*, 526 U.S. at 583-584. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180 (1979) (holding that because both personal jurisdiction and venue are waivable, "when there is a sound prudential justification for doing so, * * * a court may reverse the normal order of considering personal jurisdiction and venue").

basis for applying a different rule when a court abstains on the basis of *forum non conveniens*.

The court of appeals' analysis was based on its misreading of a statement in *Gulf Oil* that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." Pet. App. 21a (footnote omitted; quoting *Gulf Oil*, 330 U.S. at 504). That statement is true enough when a court has already determined that jurisdiction or proper venue is lacking. At that point, there is no role for *forum non conveniens* to play. But *Gulf Oil* did not present the question whether a court could dismiss on *forum non conveniens* grounds before definitively ascertaining its own jurisdiction. Rather, the question presented was whether even a court that concededly *has* jurisdiction and is a proper venue could decline to exercise its jurisdiction on *forum non conveniens* grounds. Thus, the statement on which the court of appeals relied was made in response to an argument that because the district court possessed jurisdiction, and venue was proper, the court was required to adjudicate the dispute. See 330 U.S. at 504 (explaining that the fact that federal statutes "empower [the district] court to entertain" the suit "does not settle the question whether it must do so"). It was in that context that the Court explained that the existence of jurisdiction in the first forum does not preclude application of *forum non conveniens* because "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant" can be sued. *Id.* at 506-507. While in that sense the doctrine "presupposes" the propriety of the first forum, the Court said nothing about a court's authority to presume, rather than definitively decide, the propriety of the first forum, or to dismiss on the ground that

"even if" the first forum does have jurisdiction, that court would decline to exercise its jurisdiction in favor of a more convenient venue. *American Dredging*, 510 U.S. at 448 (doctrine allows court to dismiss case "*even if* jurisdiction and proper venue are established") (emphasis added).[6]

b. There is nothing unique about *forum non conveniens* and other venue-type determinations that require that they—unlike other non-merits, threshold issues—can be decided only after the court has ascertained its jurisdiction. To the contrary, in other contexts, this Court has held that a court may make venue determinations without first ensuring that it possesses jurisdiction. For example, courts can, and sometimes should, dismiss a case on venue grounds before addressing the question of personal jurisdiction, such as when the jurisdictional question poses a difficult constitutional issue. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180-181 (1979) (reversing judgment on the ground that the district court lacked venue, without reaching the question of personal jurisdiction).

In *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962), moreover, the Court held that a district court may transfer the case to another venue pursuant to 28 U.S.C.

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[6] In support of its conclusion, the court of appeals cited (Pet. App. 23a) 15 Charles Alan Wright et al., *Federal Practice and Procedure* § 3828, at 287 (2d ed. 1986). Notably, that treatise provides no analysis to support the assertion, and no authority other than the language in *Gulf Oil* discussed above. Another respected treatise concludes, to the contrary, that "[t]he Second and D.C. Circuits have the better view. Just as the Supreme Court rejected the view that subject matter jurisdiction must be decided first in favor of a more flexible rule, the Court is likely to reject the absolute view adopted by the [court of appeals] here." 17 James Wm. Moore, *Moore's Federal Practice* § 111.90A at 111-248.2-248.3 (3d ed. 2006).

1406(a), which authorizes a district court to transfer a case filed in an improper venue "if it be in the interest of justice," whether or not the transferor court has personal jurisdiction over the defendant. See 369 U.S. at 466 (Section 1406(a) authorizes transfer of a case "whether the court in which it was filed had personal jurisdiction over the defendants or not"). Subsequent to *Goldlawr*, Congress provided courts express statutory authority to order a transfer of venue "in the interest of justice" in a case in which the court "finds that there is a want of jurisdiction." 28 U.S.C. 1631.

Similarly, a majority of circuits have held that, like a transfer under Section 1406(a), a transfer under 28 U.S.C. 1404(a), which authorizes transfer for reasons of convenience even when venue is proper in the transferor court, can also be made even if the transferor court lacks personal jurisdiction over the defendant. See, *e.g.*, *Fort Knox Music Inc.* v. *Baptiste*, 257 F.3d 108, 112 (2d Cir. 2001); *Myelle* v. *American Cyanamid Co.*, 57 F.3d 411, 413-414 (4th Cir. 1995); *Follette* v. *Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1238 (8th Cir. 1994); *Coté* v. *Wadel*, 796 F.2d 981, 985 (7th Cir. 1986); *United States* v. *Berkowitz*, 328 F.2d 358, 361 (3d Cir.), cert. denied, 379 U.S. 821 (1964); *Koehring Co.* v. *Hyde Constr. Co.*, 324 F.2d 295, 297-298 (5th Cir. 1963). Ironically, three of the circuits that have applied *Goldlawr* to Section 1404(a)—the Third, Fifth, and Seventh—are among those (including the court of appeals in this case) that have held that *forum non conveniens* dismissals require that a court first establish its jurisdiction. See Pet. App. 16a-17a (citing *Dominguez-Cota* v. *Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005); and *Kamel* v. *Hill-Rom Co.*,

108 F.3d 799 (7th Cir. 1997)).[7] None of those decisions concerning *forum non conveniens* has discussed, much less distinguished, the respective circuit's contrary rule with respect to Section 1404(a).[8]

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[7] But see *Intec USA, LLC* v. *Engle*, No. 06-1117, 2006 WL 3093644, at *2 (7th Cir. Nov. 2, 2006) (disagreeing with the Third Circuit's reading of *Kamel* and adopting the dissenting views of Judge Stapleton (discussed at p. 7, *supra*)).

[8] Two courts of appeals have held, based on an analysis similar to that of the Third Circuit in this case, that a court cannot transfer a case under Section 1404(a) if it lacks personal jurisdiction over the defendant. See *Albion* v. *YMCA Camp Letts*, 171 F.3d 1, 2 (1st Cir. 1999); *Martin* v. *Stokes*, 623 F.2d 469, 474 & n.7 (6th Cir. 1980). Cf. *McFarlane* v. *Esquire Magazine*, 74 F.3d 1296, 1301 (D.C. Cir.) (noting issue, but declining to resolve it), cert. denied, 519 U.S. 809 (1996); *Nelson* v. *International Paint Co.*, 716 F.2d 640, 643 n.4 (9th Cir. 1983) (same). The Tenth Circuit has adopted a different approach, holding that when a court lacks personal jurisdiction, "the proper course of action since the enactment of 28 U.S.C. § 1631 is to transfer pursuant to that statute." *Viernow* v. *Euripides Dev. Corp.*, 157 F.3d 785, 793 (1998).

We note one significant difference between transfers under Section 1404(a) and dismissals on *forum non conveniens* grounds. When a case brought under a federal court's diversity jurisdiction is transferred under Section 1404(a), the transferee court is required to apply the law of the transferor court, see *Ferens* v. *John Deere Co.*, 494 U.S. 516, 523 (1990); *Van Dusen* v. *Barrack*, 376 U.S. 612, 635-637 (1964), whereas a case transferred under Section 1631 for lack of jurisdiction is governed by the law of the transferee court, see 28 U.S.C. 1631 (after transfer "the action * * * shall proceed as if it had been filed in * * * the court to which it is transferred"). That difference was one reason why the Tenth Circuit concluded that transfer under Section 1631, rather than 1404(a), is appropriate when the transferor court lacks jurisdiction. *Viernow*, 157 F.3d at 793-794. Because of the different effect of transfers under Section 1404(a) and Section 1631, a transferor court sitting in diversity may need to decide a dispute concerning its jurisdiction in order to know which section is the proper basis for its transfer. That problem is not presented with respect to a dismissal on

The district court's discretionary determination in this case that it would not exercise jurisdiction over the parties' dispute, even if jurisdiction existed, is certainly no more problematic than the analogous venue-related determinations that this Court and Congress have expressly endorsed. If anything, altogether declining to exercise jurisdiction that a court might have is less problematic than affirmatively exercising authority to transfer a case when the court has already determined that it lacks jurisdiction, as is permitted under Section 1406(a), as construed in *Goldlawr*, and Section 1631.

2. Contrary to the understanding of the court of appeals (Pet. App. 23a), this Court, when it affirmed the Ninth Circuit's decision in *Patrickson* v. *Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), aff'd in part, cert. dismissed in part, 538 U.S. 468 (2003), did not "inferentially" determine that "*forum non conveniens* dismissals are invalid if the district court does not have subject matter jurisdiction."

In *Patrickson*, two Israeli corporate defendants removed a state tort suit to federal court, each claiming to be an "agency or instrumentality" of the Israeli government entitled to the protections of the FSIA, 28 U.S.C. 1603(a). 251 F.3d at 798, 805. The district court upheld its jurisdiction and dismissed the suit on *forum non*

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*forum non conveniens* grounds. In *Piper Aircraft*, the Court specifically held that the reasoning of *Van Dusen* does not apply to *forum non conveniens*. 454 U.S. at 253. Under *forum non conveniens*, the case is dismissed, rather than transferred, and the foreign jurisdiction will decide for itself what law to apply, whether or not the first court had jurisdiction. See *id.* at 247 ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.").

*conveniens* grounds. *Id.* at 798. The Ninth Circuit reversed on the question of jurisdiction and directed that the case be remanded to state court. *Id.* at 808-809. The court of appeals declared in a footnote, without analysis, that "federal courts may decide [the *forum non conveniens*] issue only if we have jurisdiction over the case." *Id.* at 800 n.3. On review of the Ninth Circuit's decision, this Court did not address that issue. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003); see also Pet. App. 35a n.26 (Stapleton, J., dissenting). The questions on which the Court granted certiorari involved only the proper construction of the "agency or instrumentality" provision of the FSIA. See 538 U.S. at 472. The Court affirmed the Ninth Circuit, concluding that the Israeli defendants were not entitled to invoke the FSIA. *Id.* at 480. The Court did not discuss in any way whether the court of appeals or district court could have addressed *forum non conveniens* before addressing jurisdiction.[9]

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[9] The Ninth Circuit's reversal of the *forum non conveniens* dismissal in *Patrickson* may have been correct for a reason wholly separate from the question presented in this case. The order of the district court dismissing the case on *forum non conveniens* grounds had conditioned dismissal on the defendants' waiving certain defenses to suit against them in the courts of the plaintiff's "home country or in the country in which his injury occurred." Pet. App. at 77a, *Dole Food Co.* v. *Patrickson*, *supra* (No. 01-593). Assuming, as we urge, that a court can dismiss on *forum non conveniens* grounds before ascertaining its jurisdiction, it would be a different question whether a court could condition such a dismissal, as the district court did in *Patrickson*, without first deciding that the court had authority over the defendant. See *In re Minister Papandreou*, 139 F.3d 247, 256 n.6 (D.C. Cir. 1998) (holding that no conditions can be placed on such a dismissal). But see *Kryvicky* v. *Scandinavian Airlines Sys.*, 807 F.2d 514, 516 (6th Cir. 1986) (permitting conditional dismissal without ascertaining jurisdiction); *Turendi* v. *Coca-Cola Co.*, No. 05 Civ. 9635, 2006 WL 3187156, at *21 n.2 (S.D.N.Y. Nov. 2, 2006) (knowing whether the defendant is

Although this Court did not in *Patrickson* endorse the part of the Ninth Circuit's ruling regarding *forum non conveniens* dismissals, the Court did, in *Ruhrgas*, quote approvingly from the principal appellate case on the other side of the debate, *In re Minister Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). In *Papandreou*, the D.C. Circuit emphasized that "[w]hat is beyond the power of courts lacking jurisdiction is adjudication on the merits, the act of deciding the case." 139 F.3d at 255. The court held that "abstention from the exercise of jurisdiction" on the ground of *forum non conveniens* "is as merits-free as a finding of no jurisdiction," and thus presented a proper non-merits, threshold basis for dismissing a case prior to establishing subject matter jurisdiction. *Ibid.* In *Ruhrgas*, this Court approvingly cited the analysis in *Papandreou* that a "court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers." 526 U.S. at 584-585 (quoting *Papandreou*, 139 F.3d at 255); see *Tenet*,

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willing to waive a limitations defense "may * * * be necessary to the forum non conveniens analysis itself"). This case does not involve a conditional dismissal, so the Court need not address that issue.

In his dissenting opinion (Pet. App. 35a n.26), Judge Stapleton offered another basis for distinguishing *Patrickson*. In his view, because (as determined by the Ninth Circuit) that case had been improperly removed from state court, federalism and comity considerations called for a remand to state court to resolve the *forum non conveniens* issue. Because this case originated in federal court, that issue likewise is not presented here. We note, however, that this Court rejected a similar argument in *Ruhrgas*. See 526 U.S. at 585-586 (rejecting argument that the district court must rule on a motion to remand for lack of subject matter jurisdiction before dismissing for lack of personal jurisdiction over the defendant).

544 U.S. at 6-7 n.4. See also *In re Arbitration Between Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 498 (2d Cir. 2002) (adopting the D.C. Circuit's analysis in *Papandreou* with respect to *forum non conveniens* dismissals).[10]

**D. Permitting Courts To Dismiss on Threshold, Non-Merits Grounds, Such As *Forum Non Conveniens*, Before Adjudicating Complex Jurisdictional Issues Promotes Article III Values**

This Court has "repeatedly emphasized the need to retain flexibility" in the application of the *forum non conveniens* doctrine. *Piper Aircraft*, 454 U.S. at 249. For example, the Court has rejected the contention that a district court should give substantial weight to the possibility that the law of the alternative forum would be less favorable to the plaintiff. *Id.* at 251. The Court explained that the *forum non conveniens* doctrine "is designed in part to help courts avoid conducting complex exercises in comparative law," thereby promoting the public interest in judicial economy. *Ibid.*; see *Gulf Oil*, 330 U.S. at 508-509. The rule embraced by the court of appeals similarly undermines the interests in judicial

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[10] In addition to the decisions of the Second and D.C. Circuits, which the court of appeals noted, Pet. App. 24a-25a, the Sixth Circuit and, subsequent to the court of appeals' decision, the Seventh Circuit have also held that a court may dismiss on *forum non conveniens* grounds before deciding jurisdiction. See *Intec USA, LLC* v. *Engle*,, 2006 WL 3093644, at *2 ("Unlike the majority in *Sinochem*, we do not read [the Seventh Circuit's prior decision in] *Kamel* as committing this court to a rule that subject-matter jurisdiction always must be resolved ahead of *forum non conveniens*."); *Krywicky*, 807 F.2d at 516 (rejecting the plaintiff's argument that "the district court should have withheld consideration and disposition of the *forum non conveniens* motions until after it had resolved the issue of personal jurisdiction").

economy that the doctrine is designed to promote, as well as the judiciary's interest in not becoming unduly enmeshed in foreign controversies or matters with potentially adverse effects on our foreign relations.

There is no evident reason why the district courts (and courts of appeals on review) should be required to expend considerable judicial resources to resolve potentially complicated questions of jurisdiction, when the result of that inquiry would not change the ultimate disposition of dismissal.[11] Such wasted judicial effort and expense should particularly be avoided in cases subject to dismissal based on the *forum non conveniens* doctrine, because there is no substantial reason for those cases to be litigated in United States courts in the first place. That is especially so when jurisdictional litigation, including possible discovery with respect to the issue of personal or subject matter jurisdiction, would likely be extensive and impose upon defendants precisely the types of burdens that the *forum non conveniens* doctrine is intended to avoid. See, *e.g.*, *American Dredging*, 510 U.S. at 448-449.

Indeed, it is difficult to discern any substantial interest that would be advanced by requiring jurisdictional determinations as a prerequisite to a *forum non conveniens* dismissal. The burdens that such a rule would impose on courts and defendants are not counterbalanced by any benefit to plaintiffs. A plaintiff has little to gain by litigating the jurisdictional question. If he loses, the case is dismissed on jurisdictional grounds; if he

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[11] Indeed, the court of appeals noted that it did not reach its holding "without some regret," because requiring a court to establish jurisdiction prior to dismissing for *forum non conveniens* "may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of [judicial] resources." Pet. App. 26a.

wins, the case is dismissed for *forum non conveniens*. In either case, he has expended both time and money in pursuit of a fruitless goal. His only apparent interest in pressing the issue would be to extend the litigation and perhaps prompt a settlement. That interest plainly does not justify the hardships that the rule would impose. Similarly, no interest of the defendant would be served by a rule that required a court to resolve potentially complex issues of subject matter or personal jurisdiction before ruling on the *defendant's* motion to dismiss on *forum non conveniens* grounds.

Moreover, jurisdictional determinations frequently raise constitutional questions, and requiring a court to resolve them when it could dismiss on another non-merits, threshold ground is contrary to the principle of constitutional avoidance. See *Leroy*, 443 U.S. at 181 (deciding question of venue before personal jurisdiction because the jurisdictional question presented a novel constitutional issue).

In other cases, resolution of the jurisdictional inquiry can require the resolution of issues with sensitive foreign relations ramifications even though such pronouncements could be entirely avoided by a dismissal on *forum non conveniens* grounds. For example, in *Turendi* v. *Coca- Cola Co.*, No. 05 Civ. 9635, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006), the district court dismissed a suit on *forum non conveniens* grounds, without reaching questions of subject matter and personal jurisdiction, that was brought by Turkish citizens alleging that they had been attacked and tortured by Turkish police at the direction of a Coca-Cola bottling joint venture in Istanbul. *Id.* at *2, *13-*22. The court found that "the case presents immensely complex jurisdictional issues" that would require resolution of "delicate"

questions implicating "United States foreign policy interests" and "the lawfulness of official conduct by foreign government agents." *Id.* at *10, *12.

*Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), illustrates another setting in which resolution of a *forum non conveniens* motion might be appropriate at the threshold, without resolving a difficult jurisdictional issue. The lower courts in *Altmann* rejected a *forum non conveniens* argument, determining that an Austrian court was not an adequate alternative forum because of the plaintiff's age. *Altmann* v. *Republic of Austria*, 317 F.3d 954, 973-974 (9th Cir. 2002), aff'd, 541 U.S. 677 (2004). If the facts bearing on *forum non conveniens* had been only slightly different, a dismissal on that ground might have spared years of litigation about Austria's immunity under the FSIA, which included an exposition by the court of appeals regarding the United States' foreign policy with respect to World War II-era claims against Austria, *id.* at 965-966. Ultimately, the parties agreed to binding arbitration of the dispute in Austria, under Austrian law—a disposition similar to what Austria had long sought under the *forum non conveniens* doctrine. See Austrian Press Agency, *Ambassador Nowotny: Klimt Arbitration Welcomed by U.S. Side* (May 24, 2005) <http://www.austria.org/altpress/327a.html>. In cases that would ultimately be dismissed on *forum non conveniens* grounds in any event, intrusive jurisdictional discovery subjects foreign governments to substantial burdens that are wholly unnecessary. Just as the United States would want to have similar cases filed against it abroad dismissed promptly, foreign governments seek such treatment here.

Like *forum non conveniens*, other non-merits grounds, *e.g.*, international comity, exhaustion, or the

political question doctrine may also prove appropriate threshold bases of dismissal in cases involving foreign claims or parties. See U.S. Br., *Mujica* v. *Occidental Petroleum Corp.*, No. 05-56056 (9th Cir. filed Mar. 20, 2006) (urging affirmance of dismissal on international comity grounds without deciding whether the court's jurisdiction under the ATS extends to claims that arise extraterritorially); *Sarei* v. *Rio Tinto, PLC.*, 456 F.3d 1069, 1100-1122 (9th Cir. 2006) (Bybee, J., dissenting) (arguing that the court of appeals should have declined to reach jurisdictional issues relating to the scope of the ATS on the ground that the suit should be dismissed without prejudice until the plaintiffs had exhausted remedies available in the foreign forum); *Hwang Geum Joo* v. *Japan*, 413 F.3d 45, 47-48, 52-53 (D.C. Cir. 2005) (dismissing on political question grounds an action by Korean, Chinese, and Philippine women alleging that the Japanese army subjected them to sexual slavery during World War II, without resolving whether Japan's alleged conduct would be "commercial activity" within the meaning of the FSIA), cert. denied, 126 S. Ct. 1418 (2006).[12] Cf. *Tenet*, 544 U.S. at 7 n.4 (to "allow discovery

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[12] The District of Columbia Circuit held that the political question doctrine can be addressed before subject matter jurisdiction under the FSIA because the political question doctrine is a "jurisdictional limitation[]." *Hwang Geum Joo*, 413 F.3d at 47 (citation omitted). There is, however, some uncertainty "whether dismissal on political question grounds is jurisdictional or prudential in nature." *Arakaki* v. *Lingle*, 423 F.3d 954, 962 (9th Cir. 2005), vacated and remanded on other grounds, 126 S. Ct. 2859 (2006). See *Goldwater* v. *Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring) ("[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government."). Either way, however, treatment of the political question doctrine as a threshold issue for *Steel Co.* purposes clearly serves the interests that underlie the *Steel Co.* and

or other proceedings in order to resolve the jurisdictional question" would defeat the purposes of the *Totten* bar to suits based on secret espionage agreements).

The inflexible rule adopted by the court of appeals would force the federal courts to resolve even difficult jurisdictional issues with potentially significant implications for the Nation's foreign relations before dismissing a case in favor of a more appropriate forum in the country in which the claims arose. Although the court of appeals believed itself to be constrained by principles of judicial restraint rooted in Article III, see Pet. App. 26a, its approach undermines, rather than furthers, separation of powers interests that this Court has often acknowledged. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) (noting that "the potential implications for the foreign relations of the United States of recognizing" causes of action for violating international law "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").[13]

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Ruhrgas* decisions as well as the foreign policy interests of the United States.

[13] The United States does not suggest that litigation of the present case in federal district court would adversely affect our foreign relations. However, the court of appeals' categorical rule that jurisdictional questions must be resolved before a court may abstain from exercising jurisdiction under a discretionary doctrine such as *forum non conveniens* would deny courts the flexibility necessary to deal with cases that do present foreign affairs concerns.

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NOVEMBER 2006